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No. 88-1412

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET J. RANDALL, ET AL., PETITIONERS

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in view of petitioner's pending deportation proceedings, the court of appeals correctly ruled that her challenge to the denial of her application for adjustment of status should await the outcome of those proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-93a) is reported at 854 F.2d 472. The opinion of the district court (Pet. App. 94a-123a) is unreported. The opinion of the district director (Pet. App. 53a-74a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1988. A petition for rehearing was denied on October 24, 1988 (Pet. App. 128a-129a). Pursuant to an order issued by Chief Justice Rehnquist, the time within which to file a petition for a writ of certiorari was extended to and including February 21, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 245(a) of the Immigration and Nationality Act provides that "[t]he status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence." 8 U.S.C. 1255(a). Under regulations of the Attorney General, an alien may apply for an adjustment of status under Section 245 in two settings. First, if the alien is not in deportation proceedings, he may file an application for adjustment of status with a district director of the Immigration and Naturalization Service (INS). 8 C.F.R. 245.2(a)(1).[1] "No appeal lies from the denial of an application by the district director." 8 C.F.R. 245.2(a)(5)(ii).

Second, if the alien is placed in deportation proceedings following the district director's denial, "the applicant retains the right to renew his or her application in [deportation] proceedings under Part 242 of this chapter." 8 C.F.R. 245.2(a)(5)(ii). In such proceedings, the status adjustment application receives *de novo* consideration. *Matter of Palmieri*, 10 I&N Dec. 187, 189 (B.I.A. 1963). Denial of adjustment of status by an Immigration Judge (IJ) can be appealed to the Board of Immigration Appeals (BIA). 8 C.F.R. 3.1(b)(2), 3.36(a), 242.21. The BIA's decision is subject to exclusive review in a court of appeals. 8 U.S.C. 1105a; *Foti* v. *INS*, 375 U.S. 217, 226 (1963).

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[1] However, if the alien has been served with an order to show cause why he should not be deported or with a warrant for arrest, his application for adjustment of status "shall be made and considered only in [deportation] proceedings." 8 C.F.R. 245.2(a)(1); see also 8 C.F.R 242.17(a).

2. Petitioner Margaret J. Randall, a writer and photographer, was born in the United States in 1936.[2] Pet. App. 2a. After leaving the United States in 1961, petitioner lost her United States citizenship on July 13, 1967, when she declared her allegiance to Mexico. *Ibid.* She resided in Mexico, Cuba, and Nicaragua until 1984. *Id.* at 14a. In January 1984, petitioner entered the United States on a visitor's visa and took up residence in Albuquerque, New Mexico, near her parents' home. *Id.* at 15a, 54a, 96a. Soon thereafter, she married an American citizen, *id.* at 96a, and obtained employment as a professor at the University of New Mexico. *Id.* at 15a, 96a.

On March 14, 1984, petitioner filed an application with the district director of the INS in El Paso, Texas, seeking an adjustment of status to that of permanent resident. Pet. App. 54a. Her application rested on an immediate relative visa petition (see 8 U.S.C. 1154(a)) filed the same day by her United States citizen husband. *Ibid.*

On October 2, 1985, the district director denied petitioner's application for adjustment of status. Pet. App. 53a-74a. The district director observed that "[b]enefits under section 245 of the Act * * * are discretionary," and, citing several decisions of the BIA, stated that "[a]ll of these [BIA] decisions, with others, point out that even though the applicant appears to be statutorily eligible for the benefits under Section 245 of the Act, the grant of an application is a matter of discretion and administrative grace." *Id.* at 72a. The district director then concluded that petitioner was not entitled to the exercise of discretion in her favor because "[s]he has failed to show that she is

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[2] We refer to Margaret J. Randall as "petitioner" because this case involves the denial of her application for an adjustment of status. The other petitioners in this Court include "[s]everal prominent authors, a world association of writers, two academic colleagues, and a student enrolled in Margaret Randall's courses" (Pet. App. 26a).

clearly and beyond a reasonable doubt entitled to the benefits for which she has applied." *Id.* at 73a. In particular, the district director stated that "[h]er writings go far beyond mere dissent, disagreement with, or criticism of the United States or its policies." *Ibid.* Rather, "[h]er associations with, and her activities and writings in support of the communist dominated government of Cuba, North Vietnam, and Nicaragua; and her advocacy and support of revolutionary activity in Mexico as well as her affiliation with and participation in Communist Party activities, warrant the denial of her application for adjustment of status as a matter of discretion." *Id.* at 73a-74a. The district director allowed petitioner until October 30, 1985, to depart voluntarily from the United States. *Id.* at 21a-22a.

3. On October 28, 1985, petitioner filed an action in the United States District Court for the District of Columbia seeking review of the district director's denial of her application. Pet. App. 25a-26a. She alleged that the district director had denied her application for adjustment of status on the basis of her ideas and opinions, thereby exceeding his statutory authority and violating her First and Fifth Amendment rights. She sought a declaratory judgment that 8 U.S.C. 1182(a)(28)(G) and (C) are unconstitutional, and an injunction instructing the district director to grant her application or to reconsider it in accordance with proper statutory and constitutional standards. Pet. App. 26a-27a, 96a-97a.

On November 7, 1985, the INS issued petitioner an order to show cause why she should not be deported. Pet. App. 97a. In light of that development, the district court deferred consideration of petitioner's request for relief and the INS's motion to dismiss. *Id.* at 27a. On August 28, 1986, the IJ denied petitioner's renewed application for

adjustment of status, finding her excludable under 8 U.S.C. 1182(a)(28)(G)(v).[3] The IJ noted, however, that if petitioner were not excludable, her application would merit the favorable exercise of discretion. Pet. App. 98a-99a. Petitioner appealed that decision to the BIA, which heard oral argument on October 20, 1987. *Id.* at 25a. As of this filing, the appeal is pending before the BIA.

On June 5, 1987, the district court dismissed petitioner's action. Although the court did not precisely characterize its holding, it emphasized that its decision rested on the "procedural posture" of the case and the "unique facts" presented. Pet. App. 109a, 123a. The court initially construed petitioner's complaint to be seeking "a fair, just and unbiased determination on her request for adjustment of status." *Id.* at 114a. With that in mind, the court concluded that "[b]ased on the present record thus far, [petitioner] has received the review she seeks." *Ibid.* "Significantly," the court noted, "the [IJ's] opinion states that the favorable or unfavorable exercise of discretion cannot and must not be based upon the personal political opinion of the adjudicating officer." *Id.* at 120a. The court therefore concluded that "[i]nsofar as [petitioner's] case received favorable reconsideration on the discretionary issue by the immigration judge, there is no longer a need to remand the case to the district director." *Id.* at 122a.

4. The court of appeals affirmed, with one judge dissenting. Pet. App. 1a-93a. The court held that peti-

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[3] That subsection provides for the exclusion of aliens "who are, or at any time have been, members of any of the following classes: (G) Aliens who write or publish, or cause to be written or published, * * * any written or printed matter, advocating or teaching * * * (v) the economic, international and governmental doctrines of world communism * * *." 8 U.S.C. 1182(a)(28)(G)(v).

tioner's "resort to court is premature," but made clear that its disposition is "without prejudice to eventual renewal of [petitioner's] claims, in a proper circuit, including her contention that her status should be adjusted as of October 2, 1985, the date the district director denied her application." *Id.* at 3a.

The court noted that petitioner's action in district court "depends entirely on an ingenious, but incorrect characterization of the district director's action." Pet. App. 33a. The court explained that petitioner's request for relief rests on the notion that the district director had first found her to be statutorily eligible for adjustment of status, and had then gone on to deny her application in his discretion, based on the contents of her writings. *Id.* at 33a-34a. If petitioner's view of the district director's opinion were correct, the court observed, and if the district director's decision were "amenable to direct judicial review" (a point that the court did not resolve), then petitioner's "plea for a remand with instructions to grant her status adjustment application would be legitimate." *Id.* at 35a-36a.

But, after a careful reading of the district director's opinion, the court rejected petitioner's assertion that the district director had found her to be statutorily eligible. Pet. App. 36a-40a. Citing *INS* v. *Bagamasbad,* 429 U.S. 24 (1976), the court noted that immigration officials do not have to determine whether an applicant is eligible for adjustment if they intend to deny relief in any event as a matter of discretion. Pet. App. 36a-37a. The court concluded that it was "imaginative, but implausible, to contend that the district director here took any route other than the easy one declared open to him by the Supreme Court, *i.e.,* he pretermitted the subsections 1182(a)(2)(G) and (C) questions, skipping from them to the matter of his discretion." *Ibid.*

Because the district director had not found petitioner to be statutorily eligible, the court reasoned, a remand to the district director at this point would produce several problems. Pet. App. 42a-44a. Such a remand would be "out of sync" (*id.* at 42a) with the regulatory requirement that once an alien is in deportation proceedings, an adjustment of status application "shall be considered only in [such] proceedings." *Id.* at 43a (quoting 8 C.F.R. 245.2(a)(1)). Moreover, a "further complication" was that the IJ decision "now extant" had resolved against petitioner the precise issue that the district director would have to consider: whether petitioner is statutorily eligible for adjustment of status. Pet. App. 43a. Finally, the court added that Congress had recently enacted a law that limited reliance on constitutionally protected "beliefs, statements, or associations" as a grounds for the exclusion of aliens.[4] *Id.* at 43a-45a. This situation has a "confusion-breeding, conflict-generating potential, and renders a return to the district director hardly auspicious for [petitioner.]" *Id.* at 45a.

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[4] The court noted (Pet. App. 43a-44a) that the Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1399-1400, barred, with exceptions not relevant here, the denial of an application for permanent residence "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizens in the United States, would be protected under the Constitution." The court also observed that, while Section 901 was applicable to deportation proceedings pending in 1988, it was not applicable to adjustment applications submitted in 1984. Pet. App. 43a-45a. We note that since the court of appeals' decision, on October 1, 1988, Congress amended Section 901 to limit its application, *inter alia*, to non-immigrant aliens—those who are not seeking permanent residence status. Foreign Operations Appropriation Act, Pub. L. No. 100-461, § 555, 102 Stat. 2268-36 to 2268-37. Accordingly, the current version of Section 901 is not applicable to petitioner.

These factors convinced the court that "[j]udicial review of the questions whether and as of what date [petitioner's] status should be adjusted is not yet in order." Pet. App. 45a-46a. The court viewed petitioner's claim as more susceptible to judicial review "when the deportation proceedings have concluded." *Ibid.* At that time—if the BIA ultimately rules against her—petitioner could advance her claim for adjustment of status in the appropriate court of appeals on review on her deportation order under 8 U.S.C. 1105a. Petitioner would not be prejudiced by taking " 'the normal appeal route,' " because in such proceedings she could "assert the invalidity of the deportation proceedings" and could request the retroactive adjustment of status that she now seeks. *Id.* at 48a-50a.

Judge Mikva dissented. Pet. App. 75a-93a. Based on his own analysis of the district director's opinion (*id.* at 78a-84a), he disagreed with the majority's conclusion that the district director had not found petitioner to be statutorily eligible. Judge Mikva therefore would have held that the district director had unconstitutionally exercised his discretion to deny petitioner's application "because of his dislike for her writings and associations" (*id.* at 76a), and that "but for this unconstitutional determination, [the district director] would have granted [petitioner's] status adjustment." *Id.* at 78a. Judge Mikva was also "skeptical" that petitioner could receive full relief on review of a deportation order, because he believed that a reviewing court would be unlikely to adjust her status retroactively, and, in any event, petitioner's eligibility for citizenship might be delayed by postponing judicial review. *Id.* at 84a-91a.

ARGUMENT

Petitioner challenges the court of appeals' holding that, on the particular facts of this case, judicial review of her

statutory and constitutional claims should await completion of the pending BIA proceedings. Contrary to petitioner's contention, the court of appeals' decision does not turn on novel jurisdictional theories under 8 U.S.C. 1105a, but on the prudential factors involved in a determination of the appropriate timing of judicial review. That prudential decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioner's contentions may be raised in later proceedings, if she is unsuccessful in obtaining administrative relief from the BIA. Accordingly, this Court's review is not warranted.

1. Petitioner's principal contention (Pet. 24-34) is that the court of appeals accepted an erroneous jurisdictional theory that a district director's denial of an adjustment of status can be reviewed under 8 U.S.C. 1105a.[5] In petitioner's view, the court of appeals "has declined to review her challenge to the District Director's denial on the premise that another court of appeals can review it under [Section 1105a]." Pet. 26. Petitioner's understanding of the court of appeals' opinion is incorrect. The court did not hold that 8 U.S.C. 1105a will provide jurisdiction for a court of appeals to review the decision of the district director in this case. Instead, the court held that petitioner's statutory and constitutional claims are not suitable for judicial review now because of a variety of prudential considerations (Pet. App. 42a-50a), and, without construing Section 1105a, the court also determined that the relief

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[5] Section 1105a vests exclusive jurisdiction in the courts of appeals to review "all final orders of deportation * * * made against aliens * * * pursuant to administrative proceedings under section 1252(b) of this title." The cited section refers to proceedings to determine whether an alien is deportable. 8 U.S.C. 1252(b).

petitioner seeks could be requested in later proceedings. Pet. App. 47a-50a.[6]

The court of appeals noted several compelling factors that counsel against immediate review of petitioner's claims. The court observed (Pet. App. 45a-46a) that after an alien has been placed in deportation proceedings, his application for adjustment of status "shall be made and considered only in [those] proceedings." 8 C.F.R. 245.2(a)(1); see also 8 C.F.R. at 242.17(a). A remand of petitioner's case to the district director would be contrary to this regulation.

The court also noted that a remand at this point would be complicated by the fact that the IJ has denied petitioner's application for adjustment of status by finding her ineligible for such adjustment. Pet. App. 43a, 98a-99a.[7] Since, as the court correctly held (see p. 6, *supra*), the district director never ruled on petitioner's eligibility, he would have to consider that question on remand. Should the district director agree with the IJ, petitioner would not benefit from the remand. And assuming that he is free to disagree (an assumption that, the court of appeals noted, Pet. App. 51a n.16, is far from clear), an awkward colli-

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[6] The court of appeals thus considered both of the factors that have been identified by this Court as relevant to the proper timing of judicial review. Pet. App. 46a-47a. In its consideration, a court is required "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage." *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162 (1967); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

[7] Unlike the district director, the IJ stressed that petitioner's ideas and beliefs should play no role in the discretionary aspect of his decision—the exact problem that petitioner's district court action was brought to remedy. Pet. App. 119a-120a. But the IJ also found that petitioner is not statutorily eligible for adjustment under 8 U.S.C 1182(a)(28)(G)(v). Pet. App. 119a.

sion would be created between his authority and that of the IJ—precisely the sort of collision that INS regulations are designed to avoid. *Ibid.*[8]

Turning to the hardship to petitioner of deferring judicial review, the court of appeals expressed its view that in a later judicial review proceeding under Section 1105a, petitioner could seek to have her status adjusted retroactively by advancing equitable and constitutional arguments. In particular, the court observed that petitioner could seek retroactive relief by contending that "(i) properly construed, subsection 1182(a)(28)(G)(v) never rendered her ineligible for a visa, or (ii) if [that section] did exclude her, as the immigration judge held it did, then the measure, as applied to her, must be regarded as null from the start because incompatible with the Constitution." Pet. App. 47a-48a. The court did not address the merits of such a retroactivity argument. *Ibid.* The court noted only that petitioner herself had contended, relying on *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), that a court of equity would have power to award such retroactive relief "where necessary to 'do complete rather than truncated justice.' " Pet. App. 50a.[9] Petitioner seeks to re-

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[8] The court also noted that judicial appraisal of petitioner's case "is 'likely to stand on a much surer footing' when the deportation proceedings have concluded" (Pet. App. 46a, quoting *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 161 (1967)), and that those proceedings "may sharpen the controversy or remove the need for decision of at least some aspects of the matter" (Pet. App. 46a-47a, quoting L. Tribe, *American Constitutional Law* 78 (2d ed. 1988)). Finally, the court referred to the change in the law after the district director's action with respect to standards for considering an applicant's ideas or beliefs (Pet. App. 43a-45a), but, as indicated at note 4, *supra*, the current version of that law is not applicable to petitioner.

[9] The question whether such retroactive relief could be awarded to petitioner has not been passed on by any court and is not before this

characterize this holding as one about the future *jurisdiction* of a court of appeals under Section 1105a, but that view finds no support in the language used by the court of appeals to express its holding.

At bottom, petitioner's attack on the court of appeals' approach to the timeliness of her efforts to obtain judicial review is essentially an insistence that the court was wrong about the degree of hardship she faces by deferring that review. In petitioner's view, the court of appeals accorded too much weight to the availability of relief in another forum and at another time. Even if petitioner were correct, that disagreement would not warrant this Court's review. There is no dispute that a court of appeals reviewing a deportation order against petitioner can consider a constitutional claim that the BIA improperly denied her adjustment of status. At most, the decision of the court of appeals here could affect the dates on which petitioner

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Court. We note, however, that the BIA has held that the Attorney General does not have power to approve a status adjustment application *nunc pro tunc. Matter of Palmieri,* 10 I&N Dec. 187, 188-189 (B.I.A. 1963); see also *Matter of Talanoa,* 13 I&N Dec. 161, 163-165 (B.I.A. 1969) (same), aff'd on other grounds, 427 F.2d 1143 (9th Cir. 1970) (per curiam); *Dong Sik Kwon* v. *INS,* 646 F.2d 909, 917 (5th Cir. 1981) (en banc) ("Although discretion is given to the Attorney General to admit applicants, he has no authority to act retroactively on an [adjustment of status] application."). The statute does not provide for the retroactive adjustment of status. Section 1255(b) states that, "Upon the approval of an application for adjustment * * * the Attorney General shall record the alien's lawful admission for permanent residence *as of the date the order of the Attorney General approving the application for the adjustment of status is made.*" 8 U.S.C. 1255(b) (emphasis added). Compare 8 U.S.C. 1153(h) (1976) (providing for the retroactive readjustment of refugee status to that of alien lawfully admitted for permanent residence), repealed, Refugee Act of 1980, Pub. L. No. 96-212, § 203(c)(8), 94 Stat. 107.

would be granted such adjustment and thereafter become eligible for naturalization.[10] See 8 U.S.C. 1427, 1430. While the timing of that decision could affect petitioner, she cites no decision of this Court requiring a court to bow to any possible hardship to a litigant rather than determining that judicial review must be deferred. Cf. *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (requiring federal court abstention in view of pending state administrative proceedings).

Taking account of the ongoing deportation proceedings and the immigration judge's ruling, the court of appeals simply determined that petitioner's request for review has been overtaken by the administrative process and that she must await its outcome. The court of appeals' holding that petitioner must pursue that course, rather than obtaining an immediate decision on her claims, "assure[s] that eventual court review will be enlightened by a full record, including the [BIA's] decision, and that this court avoids premature blockage of, or interference with, regulatory actions Congress has assigned to other government bodies." Pet. App. 48a-49a.

2. Because of the narrow, prudential basis of the court of appeals' decision, this case does not conflict with the holdings of this Court construing the scope of 8 U.S.C. 1105a. Petitioner contends (Pet. 29-30) that the court of appeals' holding conflicts with *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), but that argument misconceives the

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[10] In our view, however, the provisions of the Immigration and Nationality Act governing the adjustment of status (see note 9, *supra*) would not permit a court—even one reviewing the district director's decision, as petitioner seeks—to adjust an alien's status retroactively to the date of application. Cf. *INS* v. *Pangilinan*, 108 S. Ct. 2210 (1988) (rejecting the use of a court's equitable authority to extend a statutory cut-off date to apply for naturalization).

issues presented in each case. *Cheng Fan Kwok* holds that the denial of a stay of deportation by a district director is not reviewable in a court of appeals under Section 1105a because it "neither is a final order of deportation, nor is it * * * 'made during the same proceedings' in which a final order of deportation has been issued." 392 U.S. at 212-213 & n.11.[11] If the court of appeals had held that the rulings of INS district directors could generally be reviewed under Section 1105a, petitioner's claim of a conflict with *Cheng Fan Kwok* might have merit. But the court of appeals did not espouse any such rule. Rather, the court held only that petitioner's constitutional and equitable arguments might entitle her to retroactive relief when a court reviews her claim under Section 1105a. Nothing in *Cheng Fan Kwok* would rule out such relief.

Moreover, even in jurisdictional terms, *Cheng Fan Kwok* is not as absolute a bar to petitioner's presentation of her claim for relief under Section 1105a as she portrays it to be. The Court in *Cheng Fan Kwok* expressly reserved the possibility that some decisions of a district director might be subject to review under Section 1105a on a theory of pendent jurisdiction. 392 U.S. at 216 n.16

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[11] The Court added that, "In situations to which the provisions of [Section 1105a] are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." 392 U.S. at 210. That suggestion is not inconsistent with the holding here. The court of appeals held only that review is not timely because of factors not considered in *Cheng Fan Kwok* – the difficulties produced if a district court were to hear a challenge to a district director's denial of an application when the same application has been renewed before, and rejected by, an immigration judge. The court of appeals noted the distinction between this case and *Cheng Fan Kwok* (Pet. App. 50a n.16). (We note that the word "state" in line 5 of the second paragraph of that footnote, as printed in Petitioner's Appendix, should read "stay").

("We intimate no views on the possibility that a court of appeals might have 'pendent jurisdiction' over denials of discretionary relief, where it already has before it a petition for review from a proceeding conducted under § 242(b)."). [12] While we do not concede that pendent jurisdiction would be available for petitioner, she has not yet explored such an approach before a court of appeals. We note only that *Cheng Fan Kwok* does not foreclose her from framing an argument for relief under Section 1105a. [13]

3. Petitioner next contends (Pet. 26, 28-33) that the decision in this case conflicts with holdings of other courts of appeals. Petitioner's claim of a conflict depends entirely on her view that the court of appeals resolved a jurisdictional issue about the scope of Section 1105a. The cases cited by petitioner do deal with that issue, but that was not

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[12] The courts of appeals have responded to this suggestion by developing pendent jurisdiction principles in this area. See, *e.g.*, *Ghorbani* v. *INS*, 686 F.2d 784, 789-790 (9th Cir. 1982) (pendent jurisdiction under Section 1105a requires that there have been a factual hearing or that one is unnecessary because the question is purely legal); *Tooloee* v. *INS*, 722 F.2d 1434, 1437 (9th Cir. 1983) (same); *Mohammadi-Motlagh* v. *INS*, 727 F.2d 1450 (9th Cir. 1984) (same). The Tenth Circuit, one of the courts of appeals where petitioner could challenge a deportation order against her, has applied a pendent jurisdiction analysis. *Olaniyan* v. *District Director, INS*, 796 F.2d 373, 376 (1986) (rejecting pendent jurisdiction on the facts presented).

[13] See also *Chadha* v. *INS*, 462 U.S. 919 (1983), in which the Court held that a court of appeals had jurisdiction under Section 1105a over a constitutional challenge to a one-house veto of the Attorney General's suspension of deportation. The Court reasoned that "the term 'final orders' in [Section 1105a] 'includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.' " 462 U.S. at 938 (quoting *Chadha* v. *INS*, 634 F.2d 408, 412 (9th Cir. 1982)).

the basis of the court of appeals' decision in this case. None of the cases cited by petitioner considered the question of the timeliness of judicial review that was addressed by the court of appeals.

The overwhelming majority of the cases petitioner cites involve courts of appeals' refusal to hear, under Section 1105a, complaints about district directors' denials of forms of relief other than adjustments from temporary to permanent status.[14] Those cases do not involve requests for retroactive relief along the lines petitioner would seek if her constitutional claims were ultimately sustained. Other cases cited by petitioner hold (or suggest) that the determinations of district directors may be challenged in district court in the first instance, but none involves a challenge to a district director's denial of relief in the midst of ongoing deportation proceedings, where the court's immediate exercise of jurisdiction could impermissibly in-

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[14] See *Sadegh Nobari* v. *INS*, 676 F.2d 1348 (10th Cir. 1982) (court of appeals refused to consider, on petition for review under 8 U.S.C. 1105a, the district director's refusal to grant a change from one temporary status to another—a matter that was not or could not be renewed before the IJ); *Ibrahim* v. *U.S. INS*, 821 F.2d 1547 (11th Cir. 1987) (same with respect to district director's denial of waiver of foreign residency requirement in applying for immigrant visa); *Conti* v. *INS*, 780 F.2d 698 (7th Cir. 1985) (same with respect to district director's oral denial of an immediate relative visa petition); *Fatehi* v. *INS*, 729 F.2d 1086 (6th Cir. 1984) (same with respect to district director's denial of permission to transfer schools); *Torabpour* v. *INS*, 694 F.2d 1119 (8th Cir. 1982) (same with respect to district director's decision not to grant an extension on a student visa); *Fleurinor* v. *INS*, 585 F.2d 129 (5th Cir. 1978) (same with respect to district director's denial of asylum when, under the then-current statute and regulations, the application could not be renewed before the IJ); *Wall* v. *INS*, 722 F.2d 1442, 1443-1444 (9th Cir. 1984) (same with respect to district director's discretionary denial of "deferred action status").

terfere with the administrative process—as it could here.[15] Cf. *Small* v. *Kiley*, 567 F.2d 163 (2d Cir. 1977) (reversing preliminary injunction against deportation proceedings); *Nasan* v. *INS*, 449 F. Supp. 244, 246 (N.D. Ill. 1978) (entertaining challenge to district director action, but implying that court's intervention would be unnecessary if alien were in deportation proceedings from which he would have a "clear method of review" in the court of appeals).

Finally, a handful of courts of appeals' decisions cited by petitioner hold that a district director's denial of adjustment of status is not reviewable in the court of appeals together with a deportation order under 8 U.S.C. 1105a.[16] Nothing in those opinions, however, indicates that the

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[15] See, *e.g.*, *Salehpour* v. *INS*, 761 F.2d 1442 (9th Cir. 1985) (permitting district court's review of the denial of adjustment of status in a case in which there was no pending deportation proceeding and no possibility of producing a conflict with the ruling of the IJ); *Jaa* v. *United States INS*, 779 F.2d 569 (9th Cir. 1986) (permitting district court review of district director's denial of adjustment of status in a case in which deportation proceeding had concluded and the applicant apparently had not renewed her adjustment application in those proceedings); *Olaniyan* v. *District Director, INS*, 796 F.2d 373, 376 (10th Cir. 1986) (court of appeals, on review of a deportation order, suggested that district director's denial of work authorization could be reviewed in district court); *Shoja* v. *INS*, 679 F.2d 447, 450-451 (5th Cir. 1982) (same with respect to district director's denial of a request to transfer from one university to another).

[16] In *Che-Li Shen* v. *INS*, 749 F.2d 1469, 1472 (10th Cir. 1984) (cited at Pet. 26, 31), the court stated that it had jurisdiction to review only the denial of an adjustment of status application by the IJ, and "[i]t follows, then, that the District Director's * * * denial of Shen's original adjustment application is not reviewable in this Court." *Id.* at 1472. But because the court concluded (*id.* at 1473) that Shen was not qualified for an immigrant visa—a requirement for adjusting one's status—it never had to address the question of the effective date of

aliens had requested the court to exercise pendent jurisdiction or to grant retroactive relief based on the sort of equitable grounds to which the court of appeals alluded here. In short, none of the court of appeals' decisions cited by petitioner addressed the prudential concerns that largely informed the court of appeals' decision in this case, nor did any consider the retroactivity claims that petitioner might raise in later proceedings.[17]

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any adjustment if Shen were qualified. *Jaa* v. *United States INS*, 779 F.2d 569 (9th Cir. 1986), affirmed the district court's review of a district director's denial of adjustment of status, apparently on the view that such a ruling fell outside the scope of Section 1105a. That case never discussed issues relating to retroactive relief.

[17] We note that the court of appeals did not reach the argument that the judgment of the district court could be affirmed on the ground that petitioner must exhaust her administrative remedies in the pending deportation proceeding rather than seeking immediate judicial review. See Pet. App. 35a; Gov't C.A. Br. 14-16. That alternative approach to the timeliness of judicial review has merit. Courts have so held in the context of asylum applications, which (like status adjustment applications) can first be made to district directors and then renewed in deportation proceedings. See *Kashani* v. *Nelson*, 793 F.2d 818, 826-827 (7th Cir.) ("[T]he goals of judicial and administrative efficiency are promoted in requiring an alien seeking asylum to exhaust his administrative remedies before seeking judicial relief. [W]e hold that aliens may not seek district court review of the District Director's denial of their asylum petitions and injunction of deportation proceedings but must exhaust their administrative remedies by renewing the asylum petition in the ensuing deportation proceeding."), cert. denied, 479 U.S. 1006 (1986); *Yim Tong Chung* v. *Smith*, 640 F. Supp. 1065, 1069 (S.D.N.Y. 1986) (dismissing action seeking review of denial of asylum by district director after deportation proceedings were pending because this would "afford judicial review twice—once by resort first to the District Court from the discretionary denial of asylum by the District Director, and then again to the Court of Appeals pursuant to § 1105a following an unsuccessful *de novo* presentation to an Immigration Judge and appeal to the BIA."). In *Jaa* v.

4. Finally, petitioner contends (Pet. 35-38) that this Court should grant certiorari on the theory that this case raises the "serious constitutional question" that would exist if "a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe,* 108 S. Ct. 2047, 2053 (1988). The court of appeals, however, did not deny petitioner a forum in which to present her constitutional claims. Rather, the court expressly reserved petitioner's right to raise those claims in a different forum and at a different time. The deferral of such review does not unconstitutionally deny petitioner an opportunity to present her claims. Cf. *Jains* v. *INS,* 612 F.2d 683, 689 (2d Cir. 1979) (rejecting claim that alien was "denied due process because he was unable to appeal the original denial of his section 245 application directly and could only do so in the context of deportation proceedings"), cert. denied, 446 U.S. 937 (1980).

Petitioner is concerned that she may somehow be precluded from obtaining complete relief in the future, but that may never come to pass. The BIA may rule in her favor, or a court of appeals reviewing her deportation order may grant her all the relief she seeks. These possibilities underscore the court of appeals' wisdom in refusing to accelerate review of the constitutional questions that petitioner presents. Those same possibilities make fully applicable here the principle that this Court will not prematurely entertain constitutional disputes that may never require judicial intervention. See *Ashwander* v. *TVA,* 297 U.S. 288, 345-356 (1936) (Brandeis, J., concurring).

United States INS, 779 F.2d 569 (9th Cir. 1986), the court rejected, without analysis, an exhaustion requirement as applied to an alien's challenge to a district director's denial of status adjustment. We believe that *Jaa* is incorrect, but, in any event, that case is distinguishable because the alien there apparently did not renew her status adjustment application before the IJ and had no opportunity for judicial review other than in district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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